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No. 86-1063

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JEFFREY K. RAFSKY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITION

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The government's memorandum fails to counter the compelling reasons why this Court should review this case: the decision below nullifies this Court's decision in *Williams v. United States*, 458 U.S. 279 (1982) and imports an intolerable uncertainty into those statutes which are the cornerstones of the federal government's law enforcement efforts. The government merely parrots the flawed analysis of the Court of Appeals without ever coming to grips with the substance of petitioner's arguments. Specifically, the government's memorandum sidesteps the issues raised by petitioner in four key respects.

1. The government has failed to respond in any meaningful fashion to petitioner's *Williams* argument. As set forth in detail in petitioner's opening brief, this Court in *Williams* concluded that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'." If, as *Williams* holds, the deposit of a worthless check is not a false statement within the meaning of 18 U.S.C. §1014, that same check cannot be considered as "fraudulent" within the meaning of the "scheme to defraud" language of 18 U.S.C. §§1341 and 1343. To hold otherwise would be to permit the jury to characterize a worthless check as "false" if considered in the context of a fraudulent scheme even though *Williams* prohibits the jury from characterizing that same worthless check as "false" in the context of a "false statement" or "misrepresentation." Contrary to the government's assertion, this Court in *Williams* did *not* hold that a check kiting scheme fell beyond the scope of its ruling that a check cannot be characterized as "true" or "false." Accordingly, *Williams* mandates a reversal of the ruling of the court below.

2. The government's analysis of the second issue raised by the Petition, namely whether the Third Circuit erred in holding that a "scheme to defraud" may be executed without either a fraudulent misrepresentation or a deceitful omission, is gravely flawed. The government

fails even to mention, let alone distinguish, the recent case law from the Sixth and Seventh Circuits in which those courts have held, contrary to the Third Circuit, that "a scheme must involve some sort of fraudulent misrepresentations or omissions." *See Spiegel v. Continental Illinois National Bank*, 790 F.2d 638, 646, 649 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 579 (1986), and other cases cited at Petition, p. 8. The government is flat wrong in its assertion (Memorandum p. 6) that "in the cited cases, the courts had no need to address situations where the fraudulent scheme might be implemented by means other than an explicit lie." To the contrary, the Seventh Circuit in *Spiegel, supra*, affirmed the dismissal of a civil RICO action alleging mail fraud precisely because there was no lie, explicit or otherwise. As set forth in detail in the Petition, the Seventh Circuit in *Spiegel* found that the defendant's conduct did not give rise to a "scheme to defraud" precisely because its conduct "did not involve any fraudulent misrepresentations or omissions." 790 F.2d at 649.

Instead of confronting the case law on which petitioner relies, the government recommends to this Court a series of cases which the Petition had anticipated and distinguished.[1] In each case, a false representation or a deceitful omission was indeed central to the alleged scheme to defraud. Because there is an irreconcilable

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1. Of the twelve cases cited by the government at pages 5-6 of its memorandum, ten were analyzed in detail and distinguished in the Petition. The two additional cases, *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), *cert. granted on other grounds*, 107 S.Ct. 642 (1986) and *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976) add nothing to the government's case. In both instances, the indictment hinged on a key deceitful omission. *See United States v. Gray*, 790 F.2d at 1295 (defendant failed to disclose insurance commission kickbacks); *United States v. Keane*, 522 F.2d. at 549 (defendant public official acquired tax delinquent properties without disclosing advance inside information and failed to disclose to his fellow aldermen his interest in matters pending before city council).

conflict between the view of the Third Circuit and that of two of its sister circuits, this Court should grant the Petition and resolve, once and for all, this pivotal and unsettled issue.

3. Contrary to the government's assertion (Memorandum p. 7), the enactment of the new bank fraud statute, 18 U.S.C. §1344, does not trivialize the significance of the issues raised by petitioner.[2] To the contrary, since the language of the new bank fraud statute parallels that of the mail fraud and wire fraud statutes, the uncertainty which presently inheres in the "scheme to defraud" language of Sections 1341 and 1343 is imported wholesale into Section 1344. The same definitional problems which have plagued the circuit courts in the interpretation of the term "scheme to defraud" in the mail fraud and wire fraud statutes will continue to vex them as they confront the identical term in the bank fraud statute. Because, as the government concedes (Memorandum p. 7), "the language [used] in Section 1344 [is] identical to that in Section 1343", the issue of whether the Third Circuit erred in holding that a "scheme to defraud" need not be executed by means of fraudulent misrepresentations or deceitful omissions is thus critical not only to the interpretation of the wire fraud statute under which petitioner was convicted but also to the interpretation of the new bank fraud statute as well.

4. The government resurrects in its memorandum a theory of the case which it articulated for the first time before the Third Circuit but which it neither alleged in

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2. 18 U.S.C. §1344 provides in pertinent part:

(a) Whoever knowingly executes or attempts to execute, a scheme or artifice—

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured institution by means of false or fraudulent pretenses, representations or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

the indictment nor presented to the jury. The government's assertion (Memorandum p.3, n.1) that the misrepresentation requirement of Section 1343 is satisfied by certain statements allegedly made by petitioner to the Bank and to his controller is a vain attempt to obfuscate the real issues before this Court. The indictment never alleged, and the jury was never asked to consider, whether those statements constituted misrepresentations. As far as the jury was concerned, those statements were without legal significance. They may not now be thrust to the fore to supply the required element of misrepresentation missing from the government's case.

Review by the Court is essential to resolve the untenable ambiguity which now inheres not only in the mail fraud, wire fraud and bank fraud statutes, but in the Racketeer Influenced and Corrupt Organizations Act (RICO), since violations of those underlying substantive statutes serve as predicate acts for criminal prosecution or civil recovery under RICO. Accordingly, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert N. de Luca, hereby certify that on March 17, 1987, three copies each of Petitioner's Reply To The Memorandum For the United States In Opposition To The Petition were served by first-class mail pursuant to Supreme Court Rule 28.4 as follows:

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I further certify that all parties required to be served have been served.

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